(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: FEB 20 2013 OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal from that decision. The matter is now before the AAO on a motion to reopen. The AAO will grant the motion and reaffirm the dismissal of the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the arts and/or a member of the professions holding an advanced degree. The petitioner initially described his occupation as that of a "visual artist/writer/sociologist." The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The AAO affirmed the director's finding regarding the national interest waiver, but withdrew the finding that the petitioner qualifies for classification as a member of the professions holding an advanced degree.

On motion, the petitioner submits witness letters and other supporting exhibits.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner filed the Form I-140 petition on October 3, 2011. The director denied the petition on February 6, 2012, and the AAO dismissed the appeal on October 11, 2012. The AAO incorporates its October 2012 decision by reference, and will quote excerpts from that decision as necessary.

There are three issues in this motion, specifically whether the petitioner qualifies for: (1) classification as a member of the professions holding an advanced degree; (2) classification as an

alien of exceptional ability in the sciences, the arts or business; and (3) the national interest waiver. The AAO will consider each of these three issues in turn.

MEMBER OF THE PROFESSIONS HOLDING AN ADVANCED DEGREE

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) includes the following definitions:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.
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> *Profession* means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

In its dismissal notice, the AAO stated:

> The petitioner's initial submission included untranslated certificates relating to his education in Mexico. In the request for evidence, the director instructed the petitioner to "submit a detailed advisory evaluation of the beneficiary's [educational] credentials . . . in terms of equivalent education in the United States." The petitioner's response included a capsule translation of his diploma, but no formal evaluation of his degree. Instead, the petitioner submitted a Spanish-language letter from [redacted] and an uncertified, unsigned English translation. The English letter indicated that the petitioner "finished his Major in sociology" and then earned "another diploma . . . [redacted] named [redacted] (emphasis in original).
>
> The petitioner has not submitted evidence to show how his Mexican degrees compare to degrees from United States institutions. Likewise, the petitioner has not shown at least five years of progressive post-baccalaureate experience in the specialty. His only claimed work experience was as the owner of his own "art academy and graphic design facility," which is somewhat related to, but distinct from, his subsequent endeavors in the United States. Therefore, the record does not contain sufficient evidence to show that the petitioner holds an advanced degree or its defined equivalent.
>
> Furthermore, the record does not show that the petitioner intends to engage in a profession. O*NET, the Department of Labor's online guide to occupational

> information, does not indicate that creative writing or visual arts qualify as professions. Rather, employment in either field is available to individuals with no college education.

The AAO acknowledged that sociology is a profession, and that the petitioner claimed to be a sociologist, but the AAO concluded that the petitioner's intended duties do not closely resemble the (largely research-based) duties of a sociologist.

Noting that the AAO withdrew the director's favorable finding on this point, the petitioner states: "That is absurd if we take in consideration that the law is only one, and should not vary from office to office." The AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if the service center director had made a finding in the petitioner's favor, the AAO would not be bound to leave that finding undisturbed. *Cf. Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Furthermore, it would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). In this instance, the AAO did not arbitrarily reverse the director's finding. Rather, the AAO explained in detail why the director's decision was in error.

The petitioner, on motion, submits "a new, more concise and formal statement about the validity of the translations about [his] academic record, experience and professional license." This motion represents the petitioner's first real opportunity to address these issues, and therefore the AAO will consider them here. In order to warrant a reversal of the AAO's decision, and a restoration of the director's initial finding, the petitioner must establish (1) that his intended occupation qualifies as a profession, and (2) that he holds an advanced degree or its defined equivalent.

On motion, the petitioner does not directly address the AAO's conclusion that he had not shown that his intended occupation qualifies as a profession. [redacted] who "Graduated from the [redacted] with a "Major in Pedagogy," stated: "I understand that [the petitioner] is intending to develop a course of art teaching along with relaxation techniques for people that is [*sic*] mentally ill. In my opinion this task requires multidisciplinary abilities versed in arts and social studies." The petitioner had previously submitted an unsigned copy of this letter; the version submitted on motion has a signature. This general statement does not show that the petitioner seeks employment in an occupation that meets the regulatory definition of a profession.

The petitioner resubmits previously submitted translations of various degrees and certificates that he earned in Mexico, along with a new declaration from [redacted] who attested to the competence of the translators. In a separate statement, [redacted] discussed the petitioner's academic history, but she did not establish that the petitioner earned degrees equivalent to a United States baccalaureate degree or higher. [redacted] indicated only that he earned "diplomas" and "certificates."

The petitioner, on motion, has not shown that the AAO erred in its previous decision. His newly submitted evidence does not warrant reversal of that decision.

EXCEPTIONAL ABILITY

In the dismissal notice, the AAO stated: "The record contains at least a skeletal claim by the petitioner that he qualifies for classification as an alien of exceptional ability in the arts. The director did not make any determination based on this claim, and the AAO, as an appellate body, will not make the initial determination in that regard."

On motion, the petitioner states that the AAO "overpassed this section by giving . . . ambiguous answers" rather than a definitive conclusion as to whether or not the petitioner qualifies for the classification. The petitioner further pursues the matter on motion.

The USCIS regulation at 8 C.F.R. § 204.5(k)(3)(ii) states that, to show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
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> (C) A license to practice the profession or certification for a particular profession or occupation;
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> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
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> (E) Evidence of membership in professional associations; or
>
> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

When the petitioner first appealed the denial of the petition, he set forth a skeletal claim of exceptional ability, stating:

1. I possess an advanced degree
2. I possess 10 years of experience

3. I possess a professional license.

The above assertions correspond to the regulatory standards at 8 C.F.R. § 204.5(k)(3)(ii)(A), (B) and (C). On motion, the petitioner submits new evidence to support the above claims.

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(A)

The petitioner's degree in sociology from the does not satisfy the regulatory standard because, as the AAO previously explained, sociology is a research-based academic discipline concerning "the understanding of human social behavior." In contrast, the petitioner is an artist and writer who plans, in the future, "to develop [an] arts-therapy teaching program." For similar reasons, a diploma showing the petitioner's proficiency in English is not relevant to the area of exceptional ability.

The petitioner earned a three-year degree in methods and techniques of visual arts from the He also completed five courses during a five-month session at the These materials satisfy the plain wording of the regulation.

> *Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.* 8 C.F.R. § 204.5(k)(3)(ii)(B)

The petitioner, on appeal, had stated that the appeal included a "[d]ocument that proves the implementation of [the petitioner's] academic program from 2000 to 2010." The petitioner did not identify the document, but the appeal included a translated letter from (identified elsewhere as the petitioner's mother and, apparently, his main source of financial support). The translation itself did not include a translator's certification that the translation was complete and accurate, and that the translator was competent to translate from the foreign language into English. Prior to the appeal, the director had advised the petitioner that the regulation at 8 C.F.R. § 102.3(b)(3) requires such a certification. The appeal included an unsigned statement that read, in full: "All this documentation was properly translated from Spanish to English by certified translators." This blanket statement does not satisfy the regulatory requirements.

On motion, the petitioner's submission of a new declaration from appears to be an attempt to establish the credentials of the translators. The AAO will not accept this submission at such a late date. The director had advised the petitioner of the requirements in a request for evidence, thereby providing the petitioner with an opportunity to correct the record before the issuance of the denial decision. The petitioner did not submit the required materials at that time. The purpose of a motion to reopen is to submit previously unavailable evidence, not to correct errors or deficiencies that the petitioner should have addressed at a much earlier stage in the proceeding.

Even disregarding the concerns about the translations, letter indicates that "owned and directed a graphic design/art academy facility" where the petitioner "performed as a graphic designer/art teacher" from 2000 to 2010. The letter does not indicate that this employment was full-time, as the plain wording of the regulation requires. (Another letter from the same witness identifies as a pediatrician.) Therefore, the letter is procedurally deficient and facially insufficient to meet the regulatory requirements.

Also deficient, for the same reasons as those discussed above, is a translated letter from indicating that the petitioner "collaborated with us in one of our educational programs in reference to the learning of visual arts and group therapy." The letter indicated that the "[p]rogram took place between the years of 2003-2008," but did not specify the dates of the petitioner's claimed involvement in that program.

> *A license to practice the profession or certification for a particular profession or occupation.* 8 C.F.R. § 204.5(k)(3)(ii)(C)

The petitioner had previously described his "professional license" as a "license to work at the social sciences," "issued by the This license appears to relate to his sociology degree. As the AAO has already explained, the petitioner has not established that he seeks employment as a sociologist. He has not demonstrated that his work as an artist and his intended work in art therapy constitute "work [in] the social sciences." The petitioner, therefore, has not established that his licensure is relevant to his claim of exceptional ability.

If a petitioner has submitted the evidence required under the regulation, then USCIS determines whether the evidence demonstrates "a degree of expertise significantly above that ordinarily encountered" in the arts. 8 C.F.R. § 204.5(k)(2). *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010), sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. While involving a different classification than the one at issue in this matter, the similarity of the two classifications makes the court's reasoning persuasive and applicable to the classification sought in this matter. Specifically, the regulations state a regulatory standard and provide a list of suggested types of evidence, of which the petitioner must submit a certain number. Significantly, USCIS may not unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. *Kazarian,* 596 F.3d at 1221, *citing Love Korean Church v. Chertoff,* 549 F.3d 749, 758 (9th Cir.2008). Thus, if the regulatory standard is to have any meaning, USCIS must be able to evaluate the quality of the evidence in a final merits determination. In the present instance, the petitioner has not shown that he meets the plain wording of at least three of the regulatory standards listed at 8 C.F.R. § 204.5(k)(3)(ii). Therefore, there is no need to proceed to the second step (the final merits determination).

The petitioner has not shown that the AAO erred by failing to find that he qualifies for classification as an alien of exception ability in the sciences, the arts or business.

NATIONAL INTEREST WAIVER

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO discussed the petitioner's national interest waiver claim extensively in its October 2012 dismissal notice, and need not revisit that discussion in detail here. The petitioner had stated that he has a permanent arrangement to display his work, free of charge, at which "represents artists that struggle with mental illness, and is supported by a prestigious institution that has its headquarters in NY City." The petitioner added:

> I'm seeking to develop my arts-therapy teaching program along with of which I'm now a permanent member. will open a new health wing, so I plan to start my visual arts teaching program there as a volunteer instructor. offers help in housing, affordable meals, medications, and many other programs to its members. Besides this, I can finance the launch of the project until I can introduce it in NY schools.

The AAO, in discussing these plans, stated:

> The petitioner did not submit evidence of any commitment from to fund his work, or from the New York public school system to implement an arts teaching program. When the petitioner's future plans are contingent on the actions of organizations that the petitioner does not control, then the petitioner must submit evidence from those organizations to show that those actions have taken, are taking, or will take place.

On motion, the petitioner states that his "relation[ship] with has become stronger in these recent months," and claims "new personal achievements." The petitioner lists 14 "main achievements as a cultural artist," six of which occurred after the petition's October 3, 2011 filing date. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the

petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

Even then, the petitioner has not shown that the new achievements would have qualified him for the waiver had they occurred prior to the petition's filing date. He simply lists 11 art shows where his work appeared and three books that he illustrated. The petitioner also noted that he had sold two paintings. The petitioner does not explain why these activities qualify him for the waiver or other immigration benefits. Creating art works for display, sale, and/or publication is not a noteworthy achievement for an artist; it is, rather, fundamental to the nature of what an artist does.

The petitioner states that his achievements "must be judged in their own capacity and circumstances (for example, being considered in the category of young creative artist under 40)." The petitioner cannot arbitrarily assign "categories" in this way, in order to show his achievements in a more favorable light. Similarly, the petitioner cannot unilaterally decide on the importance of his achievements, such as when he states: "I think my most commendable success as [a] visual artist if having achieved the free for life representation of a professional gallery here in New York City. I [do not know] how many artists can say that, but I assure you that just a few [can do so]." As the AAO previously noted, the gallery carrying the petitioner's work is the , which only shows art by artists with mental illnesses. This limiting factor makes it difficult to compare the petitioner's arrangement with with other artists' arrangements with other galleries, even if the petitioner had submitted evidence of such arrangements.

The petitioner, on motion, states that he is engaged in a project "[t]o help people that live[] with mental illness on their recovery, t[h]rough the learning of the visual arts, and Spanish language." The petitioner contends that this project is "supported by and The petitioner maintains that "this activity requires professional training in sociology," but does not elaborate or corroborate this claim. The petitioner had discussed this project previously, and the AAO had stated: "The record contains scant evidence about the petitioner's 'project,' much less any information about how it would provide sufficient income to support the petitioner." The petitioner does not remedy these faults on motion; he simply repeats the claim that the project exists. As the AAO previously informed the petitioner, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The AAO will affirm its prior decision to dismiss the appeal for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The AAO's decision of October 11, 2012 is affirmed. The appeal remains dismissed.